



## **Notice of Permanent Rules for Vapor Products Rules**

**This explanatory statement concerns the Washington State Liquor Control Board's adoption of rules for Vapor Products.**

The Administrative Procedure Act (RCW 34.05.325(6)) requires agencies to complete a concise explanatory statement before filing adopted rules with the Office of the Code Reviser. This statement must be provided to anyone who gave comment about the proposed rulemaking.

The Liquor and Cannabis Board appreciates your involvement in the rule making process. If you have any questions, please contact Joanna Eide, Policy and Rules Coordinator, at (360) 664-1622 or e-mail at [rules@lcb.wa.gov](mailto:rules@lcb.wa.gov).

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### **What are the agency's reasons for adopting this rule?**

Rule changes are necessary to implement changes made to statute by the Legislature during the 2016 Legislative Session creating a new regulatory scheme for vapor products. The new rules proposed as part of this rulemaking supplement the laws created by the legislature, mostly found in Chapter 70.345 RCW.

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### **Summary of public comments received on this rule proposal.**

**CR-101** – filed April 20, 2016, as WSR 16-09-118.

**CR 102** – filed September 21, 2016, as WSR 16-19-101.

Public Hearing held November 2, 2016.

### **Written Comments Received:**

Several comments were received during the comment period after the CR-101 was filed, but prior to the CR-102 filing date. Comments received prior to the CR-102 filing were mostly concerning tasting/sampling and labeling, as well as support for the regulation of vapor products in general. Many questions were received regarding how to obtain vapor products licenses and how the new state laws function especially in light of FDA deeming regulations issued in May 2016. These questions are not included in the rulemaking file as they were not comments on the rules. Included below are the comments received during this rulemaking.

- 1. Comments were received regarding packaging and labeling of vapor products.**  
Commenters expressed concerns about the differences between Washington State



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law packaging and labeling requirements and the requirements included in the FDA's deeming regulations released in May 2016. Other commenters requested that the WSLCB add provisions to provide additional labeling requirements, including minimum size requirements. Another comment was received asking the WSLCB to allow for labeling of nicotine as percent by volume, rather than the amount of nicotine labeled as milligrams per milliliter.

**WSLCB response:** The draft rules as part of this rulemaking address implementing the vapor products licenses and related administrative subjects and do not address packaging and labeling. Those requirements are in state law, under chapter 70.345 RCW. The WSLCB cannot change packaging and labeling requirements established in state law – only the Legislature can do so. The rulemaking authority provided in ESSB 6328 is somewhat limited in that it allows the WSLCB to make rules to regulate the licenses and mail and internet sales and it is not clear that the rulemaking authority would extend to additional requirements for packaging and labeling that are requested by commenters.

**Was this comment reflected in the final rule?** No. The packaging and labeling provisions are included in statute. The Legislature may consider changing statute as a result of the FDA's deeming regulations in the future to reconcile any redundancies or conflicts between federal and state law and regulations.

### 2. Clarify that the definition “vapor products” specifically includes vapor products that are labeled as non-nicotine vapor products.

**WSLCB response:** The definition of vapor products in statute describes products that “may contain nicotine,” which the WSLCB interprets to include products that do and do not contain nicotine.

**Was this comment reflected in the final rule?** No, the final rules were not adjusted as a result of this comment. The definition of vapor products is contained in statute and cannot be changed by the WSLCB through rulemaking, it can only be supplemented.

### 3. Create specificity in the preemptive language of ESSB 6328.

**WSLCB response:** The Legislature provided the preemption language in ESSB 6328. The WSLCB defers to the Legislature's language.

**Was this comment reflected in the final rule?** No. The WSLCB will work with local jurisdictions if there are questions as to what is permissible.

### 4. Set minimum requirements for tastings.

- a. Clarify that due to the new FDA deeming rule, no free samples or tasting of nicotine containing e-liquids or vaping products may be offered or provided.



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- b. Establish a registry or permit through the LCB for any licensed vapor product retailer that wishes to provide tastings to customers.
- c. Require rigorous ventilation standards be met before approving any tasting locations to help prevent vapor drift to adjacent businesses.
- d. Require that tastings may only occur by customers and that no more than three customers may taste at any one time to help prevent a lounge-like atmosphere from developing.
- e. Prohibit the vapor product retail staff from vaping within the licensed vendor. The use of videos and other technology could be used in place of an in-person demonstration.

**WSLCB response:** The WSLCB has been working with stakeholders to ensure that the parameters around tastings are understood. The FDA regulations prohibit free samples or tastings of products that contain nicotine, but that prohibition does not extend to products that do not contain nicotine. The WSLCB appreciates your concerns about the creation of a lounge environment and will continue to monitor vapor products businesses and address issues as necessary.

**Was this comment reflected in the final rule?** No. At this time, the WSLCB is focusing on implementing the licenses and may revisit some of these issues at a later date.

**5. Require that all licensed retail outlets must be permanent fixed locations (no mobile vending locations allowed).**

**WSLCB response:** This will be a requirement in the rules as drafted. A physical address is required.

**Was this comment reflected in the final rule?** Yes.

**6. Create an advisory committee and include public health agencies as primary stakeholders.**

**WSLCB response:** The rulemaking authority provided in ESSB 6328 is somewhat limited in that it allows the WSLCB to make rules to regulate the licenses and mail and internet sales. For this reason, the WSLCB is limiting this rulemaking to implementing the current regulatory scheme established by the Legislature and may revisit additional issues at a later date, at which time it will consider convening an advisory committee or group. Rulemaking authority may require some adjustments to accomplish some of those additional items.

**Was this comment reflected in the final rule?** The WSLCB did not convene an advisory committee, but did take comments from various stakeholders as part of the rulemaking process.



- 7. Provide local health departments an opportunity to implement tobacco and vapor product enforcement activities within their jurisdiction.**

**WSLCB response:** The statute was designed with specific preemptions which the WSLCB cannot change through rulemaking.

**Was this comment reflected in the final rule?** No. The statute was designed with specific preemptions which the WSLCB cannot change through rulemaking.

- 8. Carefully consider a definition for tasting that ensures retail outlets do not allow or promote lounging activities.**

**WSLCB response:** The rulemaking authority provided in ESSB 6328 is somewhat limited in that it allows the WSLCB to make rules to regulate the licenses and mail and internet sales. For this reason, the WSLCB is limiting this rulemaking to implementing the current regulatory scheme established by the Legislature and may revisit additional issues at a later date. The WSLCB appreciates your concerns about the creation of a lounge environment and will continue to monitor vapor products businesses and address issues as necessary.

**Was this comment reflected in the final rule?** The WSLCB did not further define tastings as part of this rulemaking.

- 9. Clarify the restrictions on coupons. Please consider the FDA deeming regulations for coupons which supersede state law in this area. Clarify the level of discount that is acceptable and consistent with the intent of not getting adults and children attracted to these products and to be consistent with tobacco regulations.**

**WSLCB response:** The WSLCB understands that there are several state provisions that are preempted by the federal regulations that the FDA approved earlier this year. The WSLCB and vapor products businesses have to abide by both the federal and state requirements and defer to federal requirements where those conflict with state law and regulations. The rulemaking authority provided in ESSB 6328 is somewhat limited in that it allows the WSLCB to make rules to regulate the licenses and mail and internet sales. For this reason, the WSLCB is limiting this rulemaking to implementing the current regulatory scheme established by the Legislature and may revisit additional issues at a later date should it be determined those issues fall within the WSLCB's rulemaking authority.

**Was this comment reflected in the final rule?** No. The WSLCB did not include provisions relating to discounts and coupons beyond what is included in statute as a result of ESSB 6328.



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- 10. Do not allow other businesses to operate in the same building as a retail vape shop that allows tasting/sampling.**

**WSLCB response:** The WSLCB will not license a vapor products business within another WSLCB regulated business, which is a similar restriction to other licenses that the WSLCB has jurisdiction over. They must be separate. It is unlikely that the WSLCB could prohibit other businesses from operating in the same building unless it was a shared space.

**Was this comment reflected in the final rule?** Somewhat. It is likely that the provisions in rule accommodate most of these concerns.

- 11. I applaud the LCCB for including the new “Not for Kids” label in its draft rules to prevent child access to marijuana-infused edible products. I urge the LCCB to extend this requirement to vials of vaping solution, regardless of whether or not they contain nicotine. These vials are often packaged in ways that make them appealing to children. The Washington Poison Center already deals with calls involving children ingesting vaping solution.**

**WSLCB response:** Thank you for your comments. At this time, the WSLCB is only considering the application of “Not for Kids” warning symbol on edible marijuana products.

**Was this comment reflected in the final rule?** No. At this time, the WSLCB is only considering the application of “Not for Kids” warning symbol on edible marijuana products.

- 12. Support increased requirements for record generation for vapor product licensees to enhance enforcement efforts that ultimately help keep the dangerous and unproven products out of the hands of youth.**

**WSLCB response:** Thank you for your comments.

**Was this comment reflected in the final rule?** The requirement is already contained in the rule language.

- 13. Support for reporting requirements for age restricted vapor product locations as they are critical to enforcement efforts and limiting access to minors.**

**WSLCB response:** Thank you for your comments.

**Was this comment reflected in the final rule?** Yes as the reporting requirements remain in the rule and were unchanged prior to adoption.

- 14. Maximize setback of vape stores from youth sensitive areas similar to provisions for marijuana retail in revised I-502 rules.**



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**WSLCB response:** Thank you for your comments. The “set back” requirements for marijuana licenses is included in statute. The Legislature did not include similar provisions for vapor products licenses.

**Was this comment reflected in the final rule?** No. The WSLCB is implementing the requirements as provided by the Legislature.

**15. Minimize advertising of vape products and marijuana as there is a correlation between exposure to advertising of addictive substances and increased underage use.**

**WSLCB response:** Thank you for your comments. At this time, the WSLCB is not considering rules to restrict advertising by vapor products licensees.

**Was this comment reflected in the final rule?** No. At this time, the WSLCB is not considering rules to restrict advertising by vapor products licensees.

**16. Consider outlet density of vape and marijuana retail. Increased density can negatively impact communities, especially communities of color, and contribute to the erosion of healthy youth norms and increase youth access.**

**WSLCB response:** Thank you for your comments. At this time, the WSLCB is not intending to consider density as part of the licensing process.

**Was this comment reflected in the final rule?** No. At this time, the WSLCB is not intending to consider density as part of the licensing process.

**17. Support tighter regulations on age restricted vape stores and/or requiring all vape sales to take place in stand-alone, age restricted licensed retail outlets (moving them out of convenience stores and gas stations where youth access is more likely and the product is visible to youth—consider that “vape” has crossover appeal to youth who also vape THC products).**

**WSLCB response:** Thank you for your comments. The Legislature did not address this issue in ESSB 6328. This subject is not addressed as part of this rulemaking.

**Was this comment reflected in the final rule?** No. The Legislature did not address this issue in ESSB 6328. This subject is not addressed as part of this rulemaking.

### **Public Hearing Comments:**

No public testimony was offered at the public hearing.



## **WAC Changes from Proposed Rules (CR-102) to the Rules as Adopted:**

None. The rule was adopted without any changes to the proposed rules from the CR-102 filing.